

**ACCIDENT AND PERSONAL INJURY CLAIMS IN CONSTRUCTION:**  
**NEGLIGENT ACTIVITIES, PREMISES DEFECTS,**  
**CONTROL, NEGLIGENT HIRING, AND CHAPTER 95**

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**1<sup>st</sup> ANNUAL CONSTRUCTION SYMPOSIUM**  
**January 27, 2006**  
**Dallas, Texas**

**TABLE OF CONTENTS**

	Page
<b>I. <u>PREMISES LIABILITY CLAIMS</u></b> .....	1
<b>A. <u>IN GENERAL: NO LIABILITY UNLESS CONTROL</u></b> .....	1
<b>1. <u>CONTROL DELINEATED</u></b> .....	2
<b>a. <u>DO SAFETY MEASURES AMOUNT TO CONTROL?</u></b> .....	2
<b>B. <u>TWO MAIN TYPES OF PREMISE LIABILITY CLAIMS</u></b> .....	3
<b>1. <u>NEGLIGENT ACTIVITY (proof of control required but not proof of premises liability conditions)</u></b> .....	3
<b>2. <u>PREMISES DEFECT (two types of premises defect claims)</u></b> .....	3
<b>a. <u>DEFECTS CREATED BY INDEPENDENT CONTRACTOR’S WORK ACTIVITY (proof of control required and proof of premises liability conditions)</u></b> .....	4
<b>b. <u>DEFECTS THAT EXISTED ON PREMISES OR WERE UNRELATED TO INDEPENDENT CONTRACTOR’S WORK ACTIVITY (no proof of control required, but proof of premises liability conditions is required)</u></b> ..	4
<b>3. <u>PRACTICE TIP: SPECIAL EXCEPTIONS</u></b> .....	5
<b>4. <u>PRACTICE TIP: RESPONSIBLE THIRD PARTIES</u></b> .....	5
<b>II. <u>NEGLIGENT HIRING CLAIMS</u></b> .....	5
<b>A. <u>THE ELEMENTS</u></b> .....	5
<b>B. <u>IS PROOF OF CONTROL REQUIRED?</u></b> .....	6
<b>C. <u>DOES A NEGLIGENT HIRING DUTY FLOW FROM A GENERAL CONTRACTOR TO AN EMPLOYEE OF AN INDEPENDENT CONTRACTOR?</u></b> .....	6
<b>1. <u>LEGAL DUTY ONLY ARISES FOR CERTAIN CLASSES OF PLAINTIFFS</u></b> .....	7
<b>a. <u>LEGAL DUTY ONLY OWED TO (1) THE PUBLIC AND (2) EMPLOYEES OF GENERAL CONTRACTOR</u></b> .....	7
<b>b. <u>GENERAL CONTRACTORS HAVE NO LEGAL DUTY TO EMPLOYEES OF INDEPENDENT CONTRACTORS</u></b> .....	7

**ACCIDENT AND PERSONAL INJURY CLAIMS IN CONSTRUCTION:  
NEGLIGENT ACTIVITIES, PREMISES DEFECTS, CONTROL, NEGLIGENT HIRING AND CHAPTER 95**

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**III. OWNER PROTECTION UNDER CHAPTER 95 OF THE TEXAS CIVIL PRACTICE AND REMEDIES CODE ..... 8**

**A. CHAPTER 95 FORCES PLAINTIFFS TO PROVE THAT PREMISE OWNER HAD “ACTUAL KNOWLEDGE” OF DANGEROUS CONDITION OR ACTIVITY ..... 8**

**B. CHAPTER 95 ALLEVIATES PREMISE OWNER’S DUTY TO MAKE DANGEROUS CONDITIONS REASONABLY SAFE ..... 8**

**C. CHAPTER 95’S EFFECT ON PREMISES DEFECT CLAIMS WHERE INDEPENDENT CONTRACTOR’S WORK ACTIVITY DID NOT CREATE THE DANGEROUS CONDITION (now plaintiffs may need to show control) ..... 9**

This paper will discuss: (1) the three different types of premises liability claims that may be brought by an injured employee of an independent contractor against a general contractor or a property owner; (2) negligent hiring claims brought by an employee of an independent contractor against a general contractor or a premise owner; and (3) the special protections afforded to property owners, but not general contractors, under chapter 95 of the Texas Civil Practice and Remedies Code.

**I. PREMISES LIABILITY CLAIMS**

The control issue is usually one of the key issues in any premises liability case and thus will be discussed at the outset, directly following this section. However, to be able to truly understand the significance of the control issue, it is important to be able to differentiate the three different types of claims that are commonly lumped together under the guise of “premise liability claim.” Following the discussion on control will be an analysis of the three different types of premises liability claims:

**(1) NEGLIGENT ACTIVITY CLAIMS:** based on a general contractor’s negligent activities (proof of control required);

**(2) PREMISES DEFECT CLAIMS CAUSED BY INDEPENDENT CONTRACTOR:** occurs when a premises defect is created by the work activity of the injured independent contractor (proof of control required); and

**(3) PREMISES DEFECT CLAIMS NOT CAUSED BY INDEPENDENT CONTRACTOR:** occur when the premises defect is unrelated to the injured independent contractor’s work activity (no proof of control required, but proof that condition was dangerous and general contractor had constructive knowledge of dangerous condition is required).

**A. IN GENERAL: NO LIABILITY UNLESS CONTROL**

As a general rule of Texas common law, an owner or occupier of land does not have a duty to see that an independent contractor performs work in a safe manner. *Abalos v. Oil Dev. Co.*, 544 S.W.2d 627 (Tex. 1976). However, in 1985, the Texas Supreme Court created an exception to this general rule by adopting § 414 of the Second Restatement of Torts:

One who entrusts work to an independent contractor, but who retains the control of any part of the work, is subject to liability for physical harm to others for whose safety the employer owes a duty to exercise reasonable care, which is caused by his failure to exercise his control with reasonable care.

*Redinger v. Living, Inc.*, 689 S.W.2d 415, 418 (Tex. 1985) (citing Restatement (Second) of Torts § 414 (1977)). Now, an owner of a construction site or a general contractor (hereafter referred to jointly as “general contractor” because the same standard applies to both<sup>1</sup> [except in reference to chapter 95 which will be discussed later in this paper]) has a duty to its independent contractors **only if** the general contractor has contractually retained or actually exercised control over the independent contractor’s work.<sup>2</sup> *Lee Lewis*

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<sup>1</sup> *Koch Refining Co. v. Chapa*, 11 S.W.3d 153, 157 n.1 (Tex. 1999) (“A general contractor owes the same duty as a premises owner to an independent contractor’s employee.”).

<sup>2</sup> Except in premises defect cases where the defect existed on the premises when the independent contractor arrived or that were created through some means unrelated to the work activity of the injured independent contractor. In this situation, plaintiff does not have to prove control but does have to prove that the general contractor had constructive

*Constr., Inc. v. Harrison*, 70 S.W.3d 778, 783 (Tex. 2001).

**1. CONTROL DELINEATED**

Control can be proven in one of two ways: either (1) through the existence of a contract in which the general contractor is given a right of control, or (2) via the actual exertion of control over the independent contractor's work. *Id.* Through the years, Texas courts have delineated the type of control that must exist. This control requirement is narrow and must be specific because every general contractor obviously must have some latitude to tell his independent contractors what to do, in general terms, without being subject to liability. *Koch Refining Co. v. Chapa*, 11 S.W.3d 153, 156 (Tex. 1999). To this extent, Texas courts have held that a general contractor **does not** exert control by merely: (1) being present at the job site, (2) exercising general supervisory authority over the scheduling of the independent contractor's work, (3) making efforts to ensure that the independent contractors perform their work safely, (4) ordering work to start or stop, (5) inspecting progress reports or receiving reports, (6) making suggestions or recommendations which need to be followed, or (7) prescribing alterations and deviations. *Id.* at 155-156 (quoting Restatement (Second) of Torts § 414 cmt.c (1965)); *see also McClure v. Denham*, 162 S.W.3d 346, 352 (Tex. App.—Fort Worth, 2005, no pet. h.). Also, it is not enough that an independent contractor's employees would have taken direction from the general contractor if any had been offered. *Koch*, 11 S.W.3d at 156. Further, the supervisory control must relate to the plaintiff's injury, i.e. there must be a nexus between the control exercised and the defective condition or negligent activity that caused the

injury. *Hoechst-Celanese Corp. v. Mendez*, 967 S.W.2d 354, 357 (Tex. 1998). In sum, there must be such a retention of a right of supervision that the independent contractor **is not entirely free to do the work in his or her own way.** *Koch*, 11 S.W.3d at 155-156.

**a. DO SAFETY MEASURES AMOUNT TO CONTROL?**

A discussion regarding control is not complete without mention of the effect of safety measures, or the lack thereof, on the control equation. If a general contractor requires an independent contractor to observe and comply with federal laws, general safety guidelines, or other standard safety precautions, Texas courts have ruled that this does not impose a general duty of care on the general contractor to ensure that his independent contractor's employees observe or comply with such safety standards or act in a safe manner. *Koch*, 11 S.W.3d at 156. However, if a general contractor does take certain steps to promote safety among his independent contractors, he does subject himself to a narrow duty that such steps will not increase the risk of injury. *Hoechst-Celanese Corp. v. Mendez*, 967 S.W.2d 354, 355-56, 358 (Tex. 1998). Further, even if a general contractor places a safety employee on the work site to assist in supervising safety measures, this, in and of itself, does not impute a duty upon the general contractor to the independent contractors. *Koch*, 11 S.W.3d at 156. However, when the general contractor knew of a dangerous condition before an injury occurred and approved of acts that were dangerous and unsafe and which led to the injury, Texas courts have determined that actual control was exercised that created a duty on the part of the independent contractor. *Dow Chemical Co. v. Bright*, 89 S.W.3d 602, 609 (Tex. 2002).

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knowledge of the dangerous condition and that such condition was hidden. This issue will be discussed more thoroughly later in this paper.

**B. TWO MAIN TYPES OF PREMISE LIABILITY CLAIMS**

If a general contractor is found to have controlled the means, methods, or details of an independent contractor's work, and such control relates to the resulting injury to the plaintiff, it still needs to be determined what type of negligence is at issue. There are two separate and distinct causes of action that an employee of an independent contractor can bring when he is injured at a construction site that are commonly referred to as (1) negligent activity claims, and (2) premises defect claims. *Redinger v. Living, Inc.*, 689 S.W.2d 415, 417 (Tex. 1985). Depending on the specific facts leading to injury, both causes of action may coexist, but rarely should by trial. *Alamo Lumber Co. v. Pena*, 972 S.W.2d 800, 804 (Tex. App.—Corpus Christi 1998).

**1. NEGLIGENT ACTIVITY** (proof of control required but not proof of premises liability conditions)

In order to recover under a negligent activity theory, a person must have been injured by or as a **contemporaneous** result of the activity itself rather than by a condition created by the activity. *See Dow Chem. Co. v. Bright*, 89 S.W.3d 602, 606-07 (Tex. 2002) (categorizing as “negligent activity,” pipe that had been placed by fellow employee and that fell and trapped plaintiff's arm); *Gasparid v. Dupont Dow Elastomers*, 140 S.W.3d 415 (Tex. App.—Beaumont 2004, no pet.) (A negligence action brought against a premises owner by an independent contractor's employee, who alleged that his injury occurred when he manually removed a bale and not when the compactor jammed or when the conveyor shut down, did not involve a premises defect but, rather, negligent activity.); *Wood v. Phonoscope, Ltd.*, No. 01-00-01054, 2004 WL 1172900, \*4 (Tex. App.—Houston [1st Dist.] May 27, 2004, no pet.) (mem. op.) (categorizing suit where worker was

injured when his cherry picker moved into and made contact with electrical lines causing electrocution as “negligent activity.”). In sum, the negligent activity category encompasses conditions that are not dangerous until they are put into operation. *Wood*, 2004 WL 1172900 at \*4. A negligent activity claim requires the plaintiff to prove that the general contractor controlled the injury producing work activity. *Lee Lewis Constr., Inc. v. Harrison*, 70 S.W.3d 778, 781-83 (Tex. 2001).

**2. PREMISES DEFECT** (two types of premises defect claims)

A premises defect claim, on the other hand, is a claim that the premise itself is unsafe. *See Clayton Williams, Jr., Inc. v. Olivo*, 952 S.W.2d 523, 526-27 (Tex. 1997) (holding that drill-pipe thread-protectors left on ground by work crew during previous shift constituted premises defect); *Keetch v. Kroger Co.*, 845 S.W.2d 262, 264 (Tex. 1992) (plaintiff who slipped on floor may have been injured by a condition created by spraying, but was not injured by the activity of spraying itself); *Price Drilling Co. v. Zertuche*, 147 S.W.3d 483 (Tex.App.—San Antonio 2004, reh'g overruled) (slipping on mud is a premises defect, and plaintiff's claim that activities should have taken place to clean up the mud, did not change the case into a negligent activity case); *see also McCaughtry v. Barwood Homes Ass'n*, 981 S.W.2d 325, 333 (Tex. App.—Houston [14<sup>th</sup> Dist.] 1998, pet. denied); *Corpus v. K-J Oil Co.*, 720 S.W.2d 672, 674-75 (Tex. App.—Austin 1986, writ ref'd, n.r.e.) (Both concluding that proximity of power line to work activity did not constitute “premise defect” that would trigger owner's or occupier's duty to warn because danger did not arise until independent contractor's work activity). There are two types of premises defects for which the employee of an independent contractor may seek to hold a general contractor liable: (1) defects created by the independent contractor's work activity, and (2) those that are

**ACCIDENT AND PERSONAL INJURY CLAIMS IN CONSTRUCTION:  
NEGLIGENT ACTIVITIES, PREMISES DEFECTS, CONTROL, NEGLIGENT HIRING AND CHAPTER 95**

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not created or related to the independent contractor's work activity. *Clayton Williams, Jr., Inc. v. Olivo*, 952 S.W.2d 523, 527 (Tex. 1997).

**a. DEFECTS CREATED BY INDEPENDENT CONTRACTOR'S WORK ACTIVITY** (proof of control required and proof of premises liability conditions)

The first category includes those defects the independent contractor or its injured employee created by its work activity. *Id.* In the case of either a premises defect created by the independent contractor's work activity or a case involving negligent activity, a duty to exercise reasonable care only arises if the general contractor retains **control** over the independent contractor's work. *See Olivo*, 952 S.W.2d at 528. Further, in addition to having to prove control, plaintiff must present evidence of the following premises liability conditions:

In order to prevail on a premises liability claim, a plaintiff must show that (1) the general contractor had actual or constructive knowledge of some condition on the premises; (2) the condition posed an unreasonable risk of harm [e.g. not open and obvious, hidden]; (3) the general contractor did not exercise reasonable care to reduce or eliminate the risk; and (4) the general contractor's failure to use such care proximately caused the plaintiff's injuries.

*Corbin v. Safeway Stores, Inc.*, 648 S.W.2d 292, 296 (Tex. 1983); *see also Olivo*, 952 S.W.2d at 528-29.

**b. DEFECTS THAT EXISTED ON PREMISES OR WERE UNRELATED TO INDEPENDENT CONTRACTOR'S WORK ACTIVITY** (no proof of control required, but proof of premises liability conditions is required)

The second category includes those defects that exist on the premises when the independent contractor enters for business purposes or that are created through some means unrelated to the activity of the injured independent contractor or his employer. *Olivo*, 952 S.W.2d at 528-29. With respect to existing defects, the general contractor has a duty to inspect the premises and warn of concealed hazards the general contractor knows or should have known about (**practice tip**, if plaintiff's petition does not allege a concealed or hidden condition, plaintiff has probably not pled this type of premises defect). Further, unlike other premises liability actions, claims involving existing defects, **do not require the plaintiff to prove that the general contractor controlled** the means, methods, or operative details of the independent contractors work. *See Olivo*, 952 S.W.2d at 527-28. Keep in mind that although the plaintiff is relieved of the burden of proving control, he is, in turn, burdened with proving that (1) a dangerous condition existed on the premises, and (2) that the general contractor knew, or should have known about such hidden danger. *Id.* Under the second category, a jury does not have a control question, but is given the following list of detailed conditions that plaintiff must present sufficient proof of before the jury is allowed to make a liability determination:

In order to prevail on a premises liability claim, a plaintiff must show that (1) the general contractor had actual or constructive knowledge of some condition on the premises; (2) the condition posed an unreasonable risk of harm [e.g. was not open and obvious but was hidden]; (3) the general contractor did not exercise reasonable care to reduce or eliminate the risk; and (4) the general contractor's failure to use such care proximately caused the plaintiff's injuries.

*Corbin v. Safeway Stores, Inc.*, 648 S.W.2d 292, 296 (Tex. 1983); *see also Olivo*, 952 S.W.2d at 528-29.

**3. PRACTICE TIP: SPECIAL EXCEPTIONS**

Many times plaintiffs' petitions do not adequately apprise defendants regarding which of the three possible premises liability claims are actually being alleged. In this situation, a defendant has the option of filing special exceptions which, in essence, officially ask the plaintiff to be more specific in his allegations. TEX. R. CIV. P. 91 (Special Exceptions). If plaintiff does not comply with defendant's special exception request, the court has the power to order plaintiff to replead his claims with more specificity or have certain ambiguous allegations in his petition struck. Further, special exceptions can be filed as early as, and even contemporaneously with, defendant's answer.

**4. PRACTICE TIP: RESPONSIBLE THIRD PARTIES**

A general contractor's subcontractor who carries the requisite insurance in accordance with Texas worker's compensation laws cannot be sued by his employee. Many times a general contractor is sued by the employee of an independent contractor when it is obvious that the truly negligent party is the subcontractor. Prior to 2003, there was no way to allow a jury to apportion any liability to this truly liable party, the subcontractor. Thus, even if the jury believed the subcontractor was the truly negligent party, the jury would only be allowed to apportion liability between the plaintiff, the general contractor, the premise owner, and possibly other subcontractors or miscellaneous entities, but no apportionment of liability would be allowed for the negligent subcontractor. Fortunately, the Texas Civil Practice & Remedies Code was amended in 2003, and now subcontractors, who are in compliance with Texas worker's compensation insurance

requirements, though they still **cannot** be brought into a premises liability suit instigated by their employee, can be designated as a responsible third party. TEX. CIV. PRAC. & REM. CODE § 33.004 and 33.011 (West 2005). This designation allows the jury to apportion liability to the subcontractor, though the subcontractor cannot have a judgment entered against him personally. In sum, it may be wise to designate a plaintiff's employer, who is in compliance with Texas worker's compensation laws, as a responsible third party.

**II. NEGLIGENT HIRING CLAIMS**

Negligent hiring claims not only apply to employer-employee relationships but also apply when premise owners or general contractors secure the services of an independent contractor. *See King v. Associates Commercial Corp.*, 744 S.W.2d 209, 213 (Tex. App.—Texarkana 1987, writ denied); *Moore v. Roberts*, 93 S.W.2d 236, 238-39 (Tex. App.—Texarkana 1936, writ ref'd). When plaintiff's attorneys bring premises liability causes of action, they typically allege negligent hiring claims as well. Recent case law has made it easier for general contractors to convince courts that negligent hiring claims brought by employees of independent contractors should be dismissed as a matter of law.

**A. THE ELEMENTS**

The elements of a negligent hiring cause of action are:

1. The defendant owed plaintiff a legal duty to hire competent employees;
2. The employer breached that duty; and

3. The breach proximately caused the plaintiff's injury.

*Leake v. Half Price Books, Records, Mags., Inc.*, 918 S.W.2d 559, 563 (Tex. App.—Dallas, 1996, no writ). A party is not liable for negligent hiring unless the party owes a duty to the injured party. *Nationsbank, N.A. v. Dilling*, 922 S.W.2d 950, 953-954 (Tex. 1996). Existence of duty is a threshold inquiry in a negligence action. *Doe v. Boys Club of Greater Dallas*, 868 S.W.2d 942 (Tex. App.—Amarillo, 1994); *Salina v. General Motor Corp.*, 857 S.W.2d 944, 947 (Tex. App.—Houston [1st dist.] 1993, no writ), citing *Greater Houston Transp. Co. v. Phillips*, 801 S.W.2d 523, 525 (Tex. 1990). The burden is on the plaintiff to produce evidence of a duty. *Colvin v. Red Steel Co.*, 682 S.W.2d 243, 245 (Tex. 1984).

#### **B. IS PROOF OF CONTROL REQUIRED?**

As discussed previously in this paper, most traditional premises liability causes of action require plaintiff to prove that the general contractor exerted control over the means, methods, or details of an independent contractor's work activity. However, what about negligent hiring claims? Do plaintiffs have to prove control in order to prevail on a negligent hiring claim? In formulating an answer, it is best to begin by looking at the Texas Supreme Court's purpose in creating the control requirement.

As a general rule, an owner or occupier of land does not have a duty to see that an independent contractor performs work in a safe manner. *Abalos v. Oil Dev. Co.*, 544 S.W.2d 627 (Tex. 1976). However, in *Redinger*, we created an exception to this **general rule**, by holding that “[o]ne who entrusts work to an independent contractor, but who retains the control of any part of the work [control

requirement], is subject to liability for physical harm to others for whose safety the employer owes a duty to exercise reasonable care, which is caused by his failure to exercise his control with reasonable care.” *Redinger v. Living, Inc.*, 689 S.W.2d 415, 418 (Tex. 1985) (citing Restatement (Second) of Torts § 414 (1977)).

*Ensearch Corp. v. Parker*, 794 S.W.2d 2, 6 (Tex. 1990) (emphasis added). Proof of control is a method for plaintiffs to get around the “general rule” that an owner or occupier of land does not have a duty to see that an independent contractor performs work in a safe manner. However, the “general rule” articulated by the Texas Supreme Court is not applicable to a negligent hiring cause of action. This is because a negligent hiring claim is not about a duty to ensure that an independent contractor performs work in a safe manner, but is about a duty to hire competent employees. Thus, we have an apples and oranges situation, and the control requirement, that is the only way to trigger the exception to the “general rule,” is not applicable to a negligent hiring claim that is not related in any way to the “general rule.” Thus, proof of control is not required for a negligent hiring claim. *Wood v. Phonoscope, Ltd.*, No. 01-00-01054, 2004 WL 1172900 (Tex. App.—Houston [1st Dist.] May 27, 2004, no pet.) (mem. op.) (no analysis, mere recitation that “lack of control is not an element of his negligent hiring claim and proof of lack of control was therefore not dispositive of the claim.”) .

#### **C. DOES A NEGLIGENT HIRING DUTY FLOW FROM A GENERAL CONTRACTOR TO AN EMPLOYEE OF AN INDEPENDENT CONTRACTOR?**

Recent Texas court cases have shed light on whether a negligent hiring duty flows from a general contractor to an employee of an independent contractor. After analyzing these

cases, it seems that Texas courts, at least the ones that have opined on the issue, believe that **no** negligent hiring duty flows from a general contractor to an employee of an independent contractor.<sup>3</sup>

**1. LEGAL DUTY ONLY ARISES FOR CERTAIN  
CLASSES OF PLAINTIFFS**

An employer who hires an independent contractor may be held responsible for his acts if the employer “knew or should have known that the contractor was incompetent and a **third person** is injured because of such incompetency.” *Tex. Am. Bank v. Boggess*, 673 S.W.2d 398, 400 (Tex. App.—Fort Worth 1984, writ dismissed by agreement) (emphasis added). In other words, an employer has a duty to use ordinary care in employing an independent contractor. *Ross v. Tex. One P’ship*, 796 S.W.2d 206, 216 (Tex. App.—Dallas 1990, writ denied). However, this duty is not owed to everyone but only to certain classes of people, and employees of independent contractors are not members of any such class.

**a. LEGAL DUTY ONLY OWED TO (1) THE  
PUBLIC AND (2) EMPLOYEES OF  
GENERAL CONTRACTOR**

The duty associated with a negligent hiring cause of action is only applicable to (1) the general public, as well as (2) injuries resulting between employees. *LaBella v. Charlie Thomas, Inc.*, 942 S.W. 2d 127, 137 (Tex. App.—Amarillo, 1997) (The negligent hiring duty is owed “by the master to his other servants as well as to the public.”); *Arrington’s Estate v. Fields*, 578 S.W.2d 173, 178 (Tex. Civ. App.—Tyler 1979, writ refused n.r.e.) (In reference to negligent hiring - “This is a duty owed by a master to his other servants and to the public.”) *citing Texas & Pac.*

*Ry. Co. v. Johnson*, 89 Tex. 519, 35 S.W. 1042, 1044 (1896) (negligent hiring case dealing with injury between fellow servants); *Gulf, C. & S. F. Railway Co. v. Hays*, 40 Tex. Civ. App. 162, 89 S.W. 29, 31 (1905, dismissed) (“It is a well-established rule that employers are liable to their employees for injuries resulting from a failure to exercise reasonable care in selecting their co-employees”); *Shoemaker v. Texas & Pacific Railway Co.*, 29 Tex. Civ. App. 578, 583-584, 69 S.W. 990, 992 (1902 n.w.h.) (Expansion of negligent hiring duty from just fellow servants to portion of general public - “A railway company owes this duty [the negligent hiring duty owed to employees] to persons standing or walking on its track at places which it has long and continuously allowed the public to use.”).

**b. GENERAL CONTRACTORS HAVE NO  
LEGAL DUTY TO EMPLOYEES OF  
INDEPENDENT CONTRACTORS**

Further, Texas courts have specifically concluded that workers hired by independent contractors do not qualify as third parties to whom a negligent hiring duty is owed by a general contractor. *See McClure v. Denham*, 162 S.W.3d 346, 354 (Tex. App.—Fort Worth, 2005, no petition for writ of habeas corpus.) (In reference to the duty element of a negligent hiring cause of action - “Courts have held that an employee of an independent contractor, however, cannot be considered a third party to whom such a duty is owed.”); *Hagins v. E-Z Mart Stores, Inc.*, 128 S.W.3d 383, 393 (Tex. App.—Texarkana 2004, no petition for writ of habeas corpus.) (“general contractor cannot be liable to an independent contractor’s employee on the grounds of negligent hiring.”); *Rogers v. Pro-Tec Installations, Inc.*, No. 05-96-00049-CV, 1997 WL 412090, at \*9 (Tex. App.—Dallas July 24, 1997, no writ) (not designated for publication) (In analyzing the scope of the phrase “third party” as used in the context of negligent hiring, the Fifth District Court of Appeals determined that it did not include employees of independent contractors). Thus, workers hired by independent

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<sup>3</sup> Though the Texas Supreme Court has not yet been confronted with this issue.

**ACCIDENT AND PERSONAL INJURY CLAIMS IN CONSTRUCTION:  
NEGLIGENT ACTIVITIES, PREMISES DEFECTS, CONTROL, NEGLIGENT HIRING AND CHAPTER 95**

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contractors do not qualify as third parties to whom a negligent hiring duty is owed by a general contractor.

**III. OWNER PROTECTION UNDER CHAPTER 95 OF THE TEXAS CIVIL PRACTICE AND REMEDIES CODE**

In 1996, the Texas legislature enacted provisions to provide greater protection to owners of properties where construction was occurring (“premise owner”), against both premises defect and negligent activity types of premises liability claims. *Arsement v. Spinnaker Exploration Co., LLC*, 400 F.3d 238, 249 (5<sup>th</sup> Cir. 2005). These provisions are found in chapter 95 of the Texas Civil Practice and Remedies Code (“chapter 95”). TEX. CIV. PRAC. & REM. CODE § 95. Unfortunately for general contractors, unless they actually own the construction site property, they cannot take advantage of the provisions of chapter 95 unless the general contractor is hired by the premise owner, i.e. is an agent of the property owner. TEX. CIV. PRAC. & REM. CODE § 95.001; *Fisher v. Lee and Chang Partnership*, 16 S.W.3d 198, 203 (Tex. App.–Houston [1<sup>st</sup> Dist.] 2000). One of the key components of chapter 95 is the codification of the common law control requirements that were discussed earlier in this paper. Chapter 95 provides significant advantages to property owners when sued under each of the three types of premises liability claims discussed earlier, as articulated below.

**A. CHAPTER 95 FORCES PLAINTIFFS TO PROVE THAT PREMISE OWNER HAD “ACTUAL KNOWLEDGE” OF DANGEROUS CONDITION OR ACTIVITY**

Prior to chapter 95, a plaintiff who sued under a premise defect cause of action had to prove that the premise owner had constructive knowledge of the dangerous condition. *Corbin v. Safeway Stores, Inc.*, 648 S.W.2d 292, 296 (Tex. 1983); *see also Olivo*, 952 S.W.2d at 528-29. But

now this standard has been lowered for property owners, via that passing of chapter 95, from constructive knowledge to actual knowledge. TEX. CIV. PRAC. & REM. CODE § 95.003. Thus, where as before it was enough for plaintiff to argue that the premise owner should have known of the dangerous condition, i.e. constructive knowledge, now chapter 95 requires plaintiffs to present evidence that premise owners have actual first hand knowledge of the dangerous condition.

Further, prior to chapter 95, if a premise owner was sued under a negligent activity cause of action, the plaintiff was not required to prove that the premise owner had any knowledge of the dangerous activity (even constructive knowledge). But, with the adoption of chapter 95, plaintiffs must now prove that premise owners have actual knowledge of the dangerous activity that caused the injury, even in a negligent activity case. TEX. CIV. PRAC. & REM. CODE § 95.003.

**B. CHAPTER 95 ALLEVIATES PREMISE OWNER’S DUTY TO MAKE DANGEROUS CONDITIONS REASONABLY SAFE**

Under common law for premises liability actions, a premise owner must not only (1) adequately warn of the dangerous condition, but must also (2) make the condition reasonably safe. *State v. Williams*, 940 S.W.2d 583, 584 (Tex. 1996); STATE BAR OF TEXAS, TEXAS PATTERN JURY CHARGES PJC 66.4 (2003). However, the requirements for premise owners under chapter 95 leave out the requirement that premise owners must make the dangerous condition reasonably safe. Thus serving as another example of how chapter 95 was written as a protection for premise owners.

C. CHAPTER 95'S EFFECT ON PREMISES DEFECT CLAIMS WHERE INDEPENDENT CONTRACTOR'S WORK ACTIVITY DID NOT CREATE THE DANGEROUS CONDITION (now plaintiffs may need to show control)

Prior to chapter 95, if a premise owner were sued for a premises defect claim where the independent contractor's work activity did not create the dangerous condition, the plaintiff was **not** required to prove that the owner "exercised or retained some control over the manner in which the work is performed, other than the right to order the work to start or stop or to inspect progress or receive reports. TEX. CIV. PRAC. & REM. CODE § 95.003. However, now, because of chapter 95, it seems that a plaintiff may have to prove control, depending on the facts of the situation. A recent court case reasoned that if an independent contractor, who was injured by a premise defect that he did not create, was injured while attempting to reach his work site, based on chapter 95, the plaintiff would have to prove control in order for liability to be achieved. *Fisher v. Lee and Chang Partnership*, 16 S.W.3d 198, 202 (Tex. App.–Houston [1<sup>st</sup> Dist.] 2000) (plaintiff's object of work were roof mounted air conditioners, plaintiff was injured when he fell off of ladder on way to roof, though ladder was not the object of work, it was an activity related to the work, i.e. "means to reach his work site," and thus evidence of control was required). It remains to be seen how strong of a link courts will require between the premise defect and plaintiff's work activity, but where as before there was absolutely no proof of control required when an independent contractor was injured by a premises defect that he did not create, now it seems that there is at least a possibility which weighs in premise owners' favor.